STATE OF MICHIGAN

COURT OF APPEALS

HERBERT R. RUSHING,

Petitioner-Appellee,

v

BARBARA BROWN & ASSOCIATES, II, INC., a/k/a BARBARA BROWN & ASSOCIATES INC., and BARBARA BROWN,

Respondents-Appellants.

UNPUBLISHED
September 6, 2005

No. 253941
Oakland Circuit Court
LC No. 2003-049435-AA

Before: Cooper, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Respondents appeal by leave granted from the circuit court's order affirming the award rendered by the administrative law judge (ALJ). We affirm.

Petitioner was hired to be a sales manager by respondent Barbara Brown (hereinafter "Brown"). Brown was the president of two different companies, Barbara Brown & Associates, Inc., which operated under the name TCM, Detroit, and a second company, Barbara Brown & Associates II, Inc. Despite the name of the second company, note pads, the company sign, and other documentation indicated that the company was also referred to as Brown & Associates, Inc.[1] Although hired in July of 2000, an employment contract was signed by the parties in August 2000. The letterhead on the contract was entitled "Brown & Associates Inc." However, the contract was made between petitioner and "Barbara Brown & Associates, Inc. II."[2] The contract contained the following provision regarding compensation:

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[1] Brown & Associates, Inc. was registered to another person. Brown testified that it was agreed with her then partners that she would drop her first name and utilize "Brown & Associates, Inc." However, there was never any documentation filed to indicate that the business was operating under an assumed name.

[2] Respondent Brown testified that the company title was a mistake. The placement of the roman numeral was in error. The true company name was "Barbara Brown & Associates II, Inc."

> B&A[3] shall pay Sales Manager a flat fee of Seventy Five Thousand per year. A Car Allowance of $450.00 per month paid on or around the 25th of each month. B&A will pay the BC/BS or if declined will compensate in the form of a bonus at year end. Sales Compensation will be paid based on the profitability of B&A at the close of the business year end calendar. The 1st 100,000 in Profit 10% before tax, 200,000 in Profit 20% before tax.

In January 2001, an associate of Brown named Mitch Reno terminated petitioner. It was represented by Brown that Reno would be the general manager of the company until he secured the funding to purchase the company. Reno did not express any concerns regarding petitioner's performance, but indicated that he could not afford petitioner's salary. When petitioner inquired about the party responsible for his sales compensation, Reno said that, based on the economic downturn provision in the employment contract, there would be no compensation.

Petitioner reviewed his contract and did not find an economic downturn provision. He then sent a letter to the state's wage and hour division, alleging that the bonus provision of his contract had not been honored. Petitioner indicated that he worked for "Brown & Associates." Apparently, Brown received notice of the claim by petitioner, but objected because he failed to identify the company by its proper name. Petitioner was notified by a representative of the wage and hour division that he had filed against the wrong party; his true employer was "Barbara Brown & Associates II, Inc." Petitioner withdrew the claim and filed a second claim. This second claim was then challenged; it was allegedly filed after the expiration of the statute of limitations. The claim was dismissed, but following an appeal to the ALJ, was reinstated and investigated. Ultimately, an investigator concluded that petitioner was entitled to an award. An appeal from the award was taken by both sides. Petitioner alleged that his named employer, "Barbara Brown & Associates II, Inc" as well as "Barbara Brown & Associates, Inc." and Barbara Brown the individual were responsible for his award because of the corporate shell game that was devised to circumvent the claim. Petitioner also challenged the amount of the award. The opposition alleged that the addition of parties did not relate back to the filing of the original complaint and also challenged the award. After the receipt of testimony and extensive documentary evidence, the ALJ upheld the award and concluded that the failure to pay compensation was a flagrant violation, entitling petitioner to sanctions. The circuit court affirmed the award. Respondents' application for leave to appeal was granted.

Respondents first allege that petitioner's claim was time barred based on the one year statute of limitations. We disagree. The standard of review of agency decisions was set forth in *Motycka v General Motors Corp*, 257 Mich App 578, 580-581; 669 NW2d 292 (2003):

> Pursuant to Const 1963, art 6, § 28, a court that conducts a direct review of an administrative decision must determine whether the action was authorized by law and if the decision was supported by competent, material, and substantial record evidence. Substantial evidence is evidence that reasonable persons would accept

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[3] This reference was to Barbara Brown & Associates II, Inc.

> as sufficient proof to support a decision. However, "when reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." Matters involving the interpretation of statutes are reviewed de novo; nonetheless, unless an interpretation is clearly wrong we will generally defer to the construction given a statute by the agency charged with its interpretation. [Citations omitted.]

Based on the factual record available, the determination, that the claim was timely filed, was not erroneous. MCL 408.418(1) provides, in relevant part:

> An employee who believes that his or her employer has violated this Act may file a written complaint with the Department within 12 months after the alleged violation.

A statute of limitation is a procedural device intended to promote judicial economy by protecting the rights of defendants to be free from a plaintiff who delays bringing an action to acquire an advantage over an unsuspecting defendant. *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Whether a cause of action is barred by the statute of limitations, absent disputed issues of fact, presents a question of law that we review de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). Generally, the burden of proof is on the defendant to demonstrate that all facts necessary to show expiration of the statute has occurred. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). When it appears that the cause of action is time barred, the burden of proof shifts to the party seeking to enforce the cause of action to present facts taking the case out of the operation of the statute of limitations. *Id.*

The party seeking to apply the statute of limitations as a defense has the burden of proof. In the present case, respondents failed to present any proofs regarding the computation and payment date of the bonus. Petitioner was employed from July of 2000 to January 29, 2001. Respondents contend that one of two dates is applicable, December 31, 2000, the last date for which profits would be calculated, or January 29, 2001, petitioner's last date of employment. However, petitioner's claim with the wage and hour division did not take issue with the date of his termination or the basis for his termination. Rather, the "alleged violation" at issue was the failure to pay the bonus based on profits. Respondents offered no evidence from the corporate accountant or from corporate president Brown regarding the date of computation of any profit and any date of payout of any profit. This was the alleged violation at issue, not the alleged date of termination. Moreover, while respondents alleged that the last date of the year was an appropriate date for purposes of the statute of limitations, respondents failed to present any testimony that the computation of profit occurred on the last day of the year. Consequently, the ALJ did not err in setting aside the order of dismissal. Respondents failed to meet their burden of proof in determining the date of the alleged violation; that is, put forth evidence of the date of computation and pay out of any bonus. *W R Grace, supra*.

We note that the ALJ did not examine the law on statute of limitations and determine when the alleged violation occurred. Rather, because proofs had not been placed into evidence regarding the date of computation of profit, the ALJ turned to statutory law regarding the payment of commissions. The ALJ noted that the contract and record were silent regarding the

date of computation and payment. Consequently, it examined statutory law addressing the payment of commissions and noted that the statute provided a forty-five day period in which to calculate commissions. MCL 600.2961(4). Applying the forty-five day period, the ALJ concluded that the filing of the first petition and the filing of the second petition were both timely regardless of any application of the relation back rule of MCR 2.118(D). Thus, the opinion of the ALJ was addressed on alternative grounds. That is, the ALJ concluded that the relation back rule would make the first petition timely, and in any event, both petitions were timely in light of the forty-five day rule to pay commissions. Because respondents did not contradict the second alternate basis for the ALJ's ruling with citation to authority, the decision stands. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997).

Petitioner next alleges that it was error, as a matter of law, to allow amendment of the pleadings to name Brown individually and respondent "Barbara Brown & Associates, Inc." months after the expiration of the statute of limitations. We disagree. In *Wells v The Detroit News, Inc*, 360 Mich 634, 636-637; 104 NW2d 767 (1960), the plaintiff filed suit, naming the defendant as "The Detroit News, Inc." An appearance was filed on behalf of this defendant, and all allegations of the complaint were denied. After the statute of limitations had expired, it was disclosed that the employment relationship was with "The Detroit News," which was owned by "The Evening News Association." *Id*.

In determining the propriety of amendment of the pleadings to substitute a party, the Supreme Court noted that: (1) service was had upon the person who was the proper representative of both corporations at the legal address of both corporations; (2) both corporations were in the same general business, had the same officers, and were represented by the same law firm; and (3) the officers of "The Evening News Association, Inc." were informed of the facts. Consequently, where the right party was served by the wrong name, correction of the misnomer by amendment was permitted. *Id*. at 638-641.

In *Miszewski v Knauf Construction, Inc*, 183 Mich App 312, 316-317; 454 NW2d 253 (1990), this Court discussed the relation back rule regarding the addition of parties and misnomers:

> An amendment of pleadings under MCR 2.118(D) will generally not relate back to the original filing date for purposes of adding a new principal defendant. However, where the amendment of pleadings is done merely to correct a prior error in naming the proper party to the lawsuit, and the defendants have not been denied notice of the action due to this misnomer, the amendments do relate back to the date of the original pleading.
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> In the instant case, plaintiff's original complaint as filed gave defendant notice of the claim against it even though it erroneously named Mr. Knauf as the defendant rather than his corporation. Plaintiff originally brought suit against Lynn Knauf doing business as Knauf Construction, Inc. It appears that service of process against Mr. Knauf would also serve to put Knauf Construction on notice of plaintiff's claims. MCR 2.105(D). 1 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), Rule 2.118, comment 6i, p 476, provides:

> In the misnomer cases there should be no problem concerning service of process if the proper defendant was served, but under the wrong name. The controlling provision, however, with respect to the service of process issue is MCR 2.102(C) rather than 2.118(D). MCR 2.102(C) states that the amendment should relate back "unless the court determines that relation back would unfairly prejudice the party against whom process issued." Under ordinary circumstances it would be hard to show prejudice when the proper defendant has been served but has been misnamed. The misnaming may be somewhat confusing, but the fact of service should be at least enough to put the defendant on notice of being sued.
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> Plaintiff's original complaint gave defendant adequate notice of the nature of plaintiff's claims and the fact that defendant was actually the proper party under these claims. The amendments to the complaint merely changed this misnaming, and did not change the nature of plaintiff's claims in any way. [Citations omitted.]

In support of the contention that petitioner named proper parties, documentation of numerous representations and inconsistencies by Brown was submitted. While the employment contract indicated that it was between petitioner and respondent "Barbara Brown & Associates Inc., II", petitioner's business cards indicated that he was employed by Brown & Associates, Inc., despite the fact that respondent Brown had never incorporated this name with the State of Michigan. Moreover, while the employment contract listed Barbara Brown & Associates, Inc., II, as the employer, the letterhead on the same contract and the sign in front of the building provided that the company name was Brown & Associates, Inc.

When the original petition was filed, it was based on the business cards and the letterhead. However, Brown was able to object to the filing because she received the notice of the claim. Brown was the president of both corporations regardless of their corporate name and the assumed name utilized. She demonstrated her notice of the claim by objecting to the deficiency in the claim, specifically the omission of the Roman numeral "II" in the petition. She was the resident agent for all of the various company names that she had created, and the businesses had the same address. Although Brown testified that she closed Barbara Brown & Associates, II, Inc. after the sale with Reno failed, she acknowledged that the legal fees to defend this litigation were being paid by Barbara Brown & Associates, Inc. The legal representation and accountant for both companies were one in the same. Under the circumstances, actual notice of the claim occurred, and the litigation was defended. Accordingly, the ALJ's decision to allow for amendment of the pleadings to reflect the corporate entities and corporate representative was supported with competent, material, and substantial evidence based on the available record. *Motycka, supra*. The evidence supported the ALJ's conclusion that respondent Brown had deliberately established the corporate entities to hide the true nature of the businesses. Moreover, the ALJ concluded that the entities were not maintained separately, noting that normal

business transactions were not occurring (i.e., forgiven loans, expenses of one business being added to another, etc.).[4]

Petitioner next alleges that the lower courts' conclusion that the contract was ambiguous was erroneous as a matter of law. We disagree. The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the contract language is clear and unambiguous, its meaning presents a question of law for the courts to determine. *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). An ambiguous provision in a contract must be construed against the drafter. See *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). A contract is considered to be ambiguous when the words utilized may reasonably be understood in different ways. *Id*. If the fair reading of a contract can be construed in two different ways, the contract is ambiguous and should be construed against its drafter. *Id*. If the terms of a contract are subject to two or more reasonable interpretations, a factual development occurs for which it is necessary to determine the intent of the parties. *SSC Associates Limited Partnership v Detroit General Retirement System*, 192 Mich App 360, 363; 480 Nw2d 275 (1991). The failure to define a contract term does not necessarily render a contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). A term of a contract can be interpreted in accordance with the commonly used meanings. *Id*. Furthermore, a court may refer to dictionary definitions to ascertain the precise meaning of a particular term. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

The provision of the contract at issue provided:

> 4. Compensation. B&A and Sales Manager, upon signing this Agreement shall agree to Plan A described below, by each initialing the plan which is to be used for purposes of compensating Sales Manager during the term of this Agreement. The "Sales Manager" shall be responsible for prospecting "New Customers", and "Assigned Customers" and provide training, guidance to both inside and outside sales persons. B&A will provide Sales Manager with a list of customers which are assigned to other Sales personnel employed by B&A.
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> Plan. A. B&A shall pay Sales Manager a flat fee of Seventy Five Thousand per year. A Car Allowance of $450.00 per month paid on or around the 25th of each month. B&A will pay the BC/BS or if declined will compensate in the form of a bonus at year end. Sales Compensation will be paid based on the profitability of B&A at the close of the business year end calendar. The 1st 100,000 in Profit 10% before tax, 200,000 in Profit 20% before tax.

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[4] Although Brown was not paid a salary from Barbara Brown & Associates II, Inc., she was paid approximately $460,000 from Barbara Brown & Associates, Inc.

In the present case, the above stated rules of contract construction were applied. It was noted that the term "profit" was not defined in the contract. The contract could be interpreted in different ways. Petitioner testified that Brown mentioned that the company had sales of nearly five million dollars and acknowledged that sales would have no bearing on his compensation if she was permitted to subtract all expenses from sales to determine profit. He testified that he expressly asked her how "profit" would be determined and gave an example of "Hollywood accounting." He testified that, in response, Brown expressly stated that his bonus would be calculated based on gross profits. On the contrary, Brown indicated that she intended the term profit to be determined after all necessary expenses were subtracted. The ALJ evaluated the two different versions of events and found in favor of petitioner. In so concluding, the ALJ took into consideration the fact that Brown drafted the contract. It was also noted that Brown's version of events was effectively fraudulent because she told petitioner about the amount of gross sales in the millions. After providing this information, she did not clarify or advise him that the figure would have no bearing on his bonus. When sufficient evidence exists to support an agency decision, a court may not substitute its judgment for that of the agency. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). An agency's factual findings are afforded deference, particularly where the agency resolved questions of witness credibility and evidentiary questions. *THM, Ltd v Comm'r of Ins*, 176 Mich App 772, 776-779; 440 NW2d 85 (1989). In the ALJ opinion, it was expressly concluded that Brown's testimony was not credible.

Respondents allege that the testimony of the experts supports the contract construction offered by respondents' interpretation for "profit." The reliance on expert testimony is without merit. The duty to interpret the law on contracts is for the courts, not the parties' expert witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Accordingly, we cannot conclude that the decision by the lower courts with regard to this issue was erroneous.[5]

Respondents next allege that it was error to award a penalty. We disagree.

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the record.

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[5] Respondents also allege that the ALJ exceeded his statutory authority by examining documentation outside the four corners of the contract to determine the bonus. This issue was not raised, addressed, and decided by the ALJ. Therefore, it is not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 163; 567 NW2d 253 (1997). In any event, the written contract provided the formula for calculation of the profit amount. The fact that the formula had to be applied to financial information that was unknown at the time of the contract's writing does not render it unenforceable. The document to calculate profit was clearly incorporated by reference. This did not cause the ALJ to exceed his authority.

[*Said v Dep't of Treasury*, 245 Mich App 489, 492; 628 NW2d 100 (2001) quoting Const 1963, art 6, § 28.]

The ALJ's award of a penalty was supported by competent, material and substantial evidence on the record. Review of the record reveals that Brown created various corporate entities that even began to confuse her. The employment contract was written on letterhead entitled Brown & Associates, Inc. Moreover, the business card for petitioner, the company's note pads, and the corporate sign in front of the building indicated that the business was called "Brown & Associates, Inc." However, Brown & Associates, Inc. was not incorporated or registered to Brown. Additionally, on the employment contract prepared by Brown, she indicated that the contract was made between "Barbara Brown & Associates Inc, II." There was no such company; rather "Barbara Brown & Associates II, Inc." was the name of the entity incorporated by Brown. Brown had a business associate named Reno fire petitioner, and petitioner was told that he was not entitled to a bonus because of the economic downturn provision of the contract. There was no such provision in the contract. Although it was represented that Reno was the new purchaser of the company, there was never any proof of the pending sale. Rather, the ALJ concluded that to avoid payment of any obligation to petitioner, Brown opted to close Barbara Brown & Associates II, Inc. down to avoid any liability in this proceeding. Consequently, the ALJ received proofs regarding the various corporate entities created by Brown, some valid and registered by Brown, and other names merely utilized by her without any formal incorporation or validation with the State of Michigan. Moreover, the ALJ was able to view the corporate documentation and structure of the corporate entities. He concluded that arms-length transactions were not occurring, and there was the transfer of what could be construed as profit from one entity to another. Petitioner tried to bring the wage and hour division claim as an in pro per, but was unable to maneuver through the corporate entities created by Brown and had to hire an attorney. The ALJ's conclusion that a flagrant violation occurred was supported by competent, material and substantial evidence on the record. *Said, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood